April Fools?

Lessons We Can Learn from Bizarre Cases

Presented by M. Keith Siskin, Circuit Court Judge

April 8, 2014

1. THE CURIOUS CASE OF KISSIE MEOUW

(A) What Happened:

"A dead woman's cat Kissie Meouw will live in the lap of luxury but the woman's only remaining descendants won't get a penny after a recent high court decision." - Albany (NY) Times Union, December 10, 2013.

Charlotte Stafford died in 2010 at age 87. She amended her will in 2007, leaving $100,000 in trust for the benefit of her cat, Kissie Meouw Stafford. The remainder of the estate ($300,000) was designated to be used to maintain the Decedent's ancestral home. The three surviving nephews got nothing. The Decedent's "friend, house-mate and care-giver, Vicky House, was designated as Kissie's caretaker."

The New York Supreme Court upheld a lower court's ruling that the Decedent was of clear mind and not under undue influence from Vicky House when she amended her will.

(B) What Can We Learn?

There is authority in Tennessee for the proposition that one can set up a private trust for the care of a specific animal. *See* Richberg, et al. v. Robbins, 228 S.W.2d 1019, 1021 (Tenn. App. 1950), *cert. denied* 3/17/50.

This is different than simply bequeathing property to a pet. In Richberg, the Court of Appeals found it "unnecessary to decide the interesting question whether a dog may be a legatee" because the language of the will raised the question whether the testator was attempting to bequeath property to the dog or to set up a private trust for the care of the dog. This was held to be a matter of construction of the will, which was "not a proper issue in probate proceedings." *See* Id. However, the Tennessee Supreme Court recently held that construction of a will **is** a proper issue in probate proceedings. In re Estate of Trigg, 368 S.W.3d 483, 496 (Tenn. 2012).

2. WHAT'S IN A NAME?

(A) What Happened:

In a decision that made international news, a Tennessee Child Support Magistrate ordered a baby's name changed from "Messiah" to "Martin," over both parents' objection. The day after the hearing, the Magistrate told a television station that "Messiah is a title, and it's a title that has only been earned by one person, and that one person is Jesus Christ." The parents appealed, and the Chancellor overruled the name change, finding the Magistrate's actions to be unconstitutional. The Magistrate was fired and later publicly censured, and is now running for General Sessions Judge in Jefferson County.

(B) What Can We Learn?

The Tennessee paternity statute provides that the Court's Order shall include the "determination of the child's name on the child's birth certificate." T.C.A. § 36-2-311(a)(8).

There appears to be no precedence in Tennessee on the issue of changing a child's *first* name in a parentage action. The leading case with regard to changing a child's surname is Barabas v. Rogers, 868 S.W.2d 283 (Tenn. App. 1993), which originated in Rutherford County. In that case, the Court of Appeals reversed the Juvenile Court's decision to change the child's surname to that of the father, finding that the parent seeking to change the child's surname has the burden of proving that the change will further the child's best interests. Additionally, in Dunn v. Palermo, 522 S.W.2d 679, 688-89 (Tenn. 1975), the Tennessee Supreme Court held that "a person's legal name is that given at birth…or as changed by affirmative acts as provided under the Constitution and laws of the State of Tennessee."

As for the Magistrate's censure, the Board of Judicial Conduct found that she violated the following rules of the Code of Judicial Conduct: 1.1 (Compliance with the Law); 1.2 (Promoting Confidence in the Judiciary); 2.2 (Impartiality and Fairness); 2.3 (Bias, Prejudice, and Harassment); and 2.10 (Judicial Statements on Pending and Impending Cases).

3. THE NUDE JUDGE

(A) What Happened:

A female Supreme Court Judge in Bosnia and Herzegovina was removed from the bench after she was photographed sunbathing in the nude on her office desk from across the street. The disciplinary commission found the Judge's behavior "damaging [to] the reputation of the judiciary institution."

(B) What Can We Learn?

Would this conduct violate the Tennessee Code of Judicial Conduct?

Rule 1.2. Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

"Integrity" is defined by the Oxford Online Dictionary as the "quality of being honest and having strong moral principles; moral uprightness."

4. DEAD MAN WALKING?

(A) What Happened:

The Petitioner, a convicted murderer, committed suicide while his *habeas corpus* petition was pending before the United States Court of Appeals for the Ninth Circuit. The defense moved to dismiss the case as moot due to the petitioner's death. The Ninth Circuit denied the motion, holding that "judicial precedents are not merely the property of private litigants, but are valuable to the legal community as a whole." Dickens v. Ryan, No. 08-99017 (9th Cir., 3/11/2014) (Internal quotation marks and citation omitted). The case is alive, even though the petitioner is not.

(B) What Can We Learn?

The mootness doctrine as applied in Tennessee was discussed in great detail by Justice Koch in Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County, et al., 301 S.W.3d 196 (Tenn. 2009). In that case, the Tennessee Supreme Court explained that a case must remain justiciable (remain a legal controversy) from the time it is filed until the moment of final appellate disposition. Id. at 203-04. A moot case is one that has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case. Id. at 204. A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. Id. "Our judicial heritage speaks to restraint in addressing issues when the parties do not have a continuing, real, live, and substantial interest in the outcome." Id. at 210.

However, Tennessee courts do not apply the mootness doctrine mechanically. There are some circumstances when courts will decline to invoke the mootness doctrine: (1) when the issue is of great public importance or affects the administration of justice; (2) when the challenged conduct is capable of repetition and of such short duration that it will evade judicial review; (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain; and (4) when the defendant voluntarily stops engaging in the challenged conduct. Id.

The Ninth Circuit has been reversed in 78.1% of its cases since the Fall of 2005…second only to the Sixth Circuit, which has an 81.6% reversal rate during that time period. (Source: *Ninth Battling to Regain Spot as 'Most Reversed' Circuit*, Findlaw.com, by William Peacock, Esq., June 11, 2013).

5. WE'RE NOT IN KANSAS ANYMORE!

(A) What Happened:

A Kansas sperm donor was ordered to pay current and retroactive child support after the lesbian couple to whom he donated his sperm separated, and the mother applied for public assistance. The man had answered an ad on Craigslist from the two women, who were seeking a sperm donor. The man donated his sperm to the women for free, and the parties signed a "sperm donor contract" that had been downloaded from the internet and purported to waive all of his parenting rights. No doctor was involved.

(B) What Can We Learn?

The Kansas trial court found that, under Kansas law, sperm donation must be done under the supervision of a physician in order to have the donor legally treated as if he were not the birth father. K.S.A. 23-2208(f). The donor argues that this 1973 law is outdated and was designed to protect heterosexual couples using sperm donation from later interference from the biological father. The case is on appeal.

Tennessee's Artificial Insemination statute, T.C.A. § 68-3-306, provides as follows: "A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife." This statute was enacted in 1977.

Tennessee's parentage statutes "were not designed to control questions of parentage where sperm or egg donation is involved." In re C.K.G., et al., 173 S.W.3d 714, 724 (Tenn. 2005).

Last year, the Tennessee Legislature enacted a new statutory scheme governing the parentage of children born of donated embryo transfer. *See* T.C.A. § 36-6-401 *et seq*. Although the statute itself deals only with embryos (post-fertilization) and not with sperm donation, it contains an interesting reference to sperm donation:

> "If the embryo was created using donor gametes, *the sperm or oocyte donors who irrevocably relinquished their rights in connection with in vitro fertilization* shall not be entitled to any notice of the embryo relinquishment, nor shall their consent to the embryo relinquishment be required." T.C.A. § 36-2-403(b) (Emphasis Added).

This language appears to suggest that sperm donors can waive their parental rights - presumably by contract - in Tennessee. But is the State bound by such contracts? Compare to voluntary surrenders in adoption cases: the father's duty to support continues, post-surrender, until the Court finalizes the adoption. *See* T.C.A. § 36-1-111 (r). The law is far from settled in this area. Advise your clients with extreme caution!

6. SOMETHING STRANGE IN THE NEIGHBORHOOD

(A) What Happened:

A group of Rhode Island teenagers drank some beer and decided to go ghost-hunting at an abandoned state institution for the mentally disabled. The property had no perimeter fence, but there were a number of "No Trespassing" signs, and the building was secured by plywood boards over the windows on the first and second floors, chains on the doors, and metal grates welded shut. The ghost-hunting teens shimmied up a pipe and gained access through a third-floor window. Inside, they found some clear glass bottles inside a locker; the bottles contained a syrup-like liquid. The teens took the bottles, and while exiting the building, one of the teens dropped his bottle, which broke, splattering the plaintiff with the unknown liquid. The liquid, which turned out to be sulfuric acid, severely burned the plaintiff.

The plaintiff (age 17) sued the State, alleging negligence based on the "attractive nuisance doctrine." The plaintiff argued that he "did not fully realize the risk in taking the bottles of sulfuric acid," and that the State "negligently failed to inspect, repair and/or maintain its premises free from defect and/or dangerous condition." *See* Burton v. State of Rhode Island, et al., 80 A.3d 856, 860 (R.I. 2013). The Rhode Island Supreme Court affirmed the lower court's dismissal of the case, noting that it had never applied the attractive nuisance doctrine to a child older than 12 years-old, and finding that "[i]t strains credulity to think that plaintiff, a seventeen-year-old who was about to complete his G.E.D., did not realize the risk involved in climbing a pipe to an upper-story window and entering a dark, abandoned building." Id. at 863. Further, the Court held that the plaintiff's status as a trespasser negated any duty on behalf of the State. Id.

(B) What Can We Learn?

Like Rhode Island, Tennessee has adopted the Restatement (Second) of Torts elements of Attractive Nuisance: **(a)** the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass; and **(b)** the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children; and **(c)** the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it; and **(d)** the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved; and **(e)** the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. *See* Metropolitan Government of Nashville and Davidson County v. Counts, 541 S.W.2d 133, 136 (Tenn. 1976).

Since Tennessee and Rhode Island both apply the Restatement (Second) elements of the doctrine, the outcome under the facts of Burton would likely be the same here.

7. PLAY BALL!

(A) What Happened:

In California, a 14 year-old little-league baseball player jubilantly threw his batting helmet in the air after scoring the winning run. The helmet struck the child's coach in the leg, and the coach sued the child and his parents. The coach alleges that the child "carelessly threw a helmet, striking Plaintiff's Achilles tendon and tearing it." The coach is seeking $500,000 for pain and suffering, and more than $100,000 for lost wages and medical bills. The coach's attorney told a local television station that "this wasn't a part of the game. A guy who volunteers his time to coach should not be subjected to someone who throws a helmet in the manner that he did. What the kid did, it crossed the line." The case is pending in the trial court.

(B) What Can We Learn?

California law applies the assumption of risk doctrine to negligence cases involving participants of organized sports, requiring the plaintiff to prove reckless or intentional conduct on the part of the defendant in order to recover for injuries sustained, because "vigorous participation in sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct." *See* Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992).

The Tennessee Supreme Court abolished implied assumption of risk as a complete bar to recovery in negligence actions twenty years ago. *See* Perez v. McConkey, 872 S.W.2d 897, 136 (Tenn. 1994). Since then, negligence cases in the context of sports-related injuries have been analyzed under the ordinary negligence standard of reasonable care under the circumstances. *See, e.g.*, Becksfort v. Jackson, 1996 WL 208786 (Tenn. App. 1996) (plaintiff tennis player hit in eye with ball from adjacent court); Fisher v. Metropolitan Government of Nashville and Davidson County, 1997 WL 80025 (Tenn. App. 1997) (plaintiff, volunteer 'stick boy' for professional hockey team, hit in eye with puck during game). The Becksfort Court pointed out that the reasonableness of a person's conduct will be measured differently depending upon the particular sport involved: "What is reasonable, acceptable, and even encouraged in the boxing ring or ice hockey rink, would be negligent or even reckless or intentional tortious conduct in the context of a game of golf or tennis." Id. at *3 fn4.

A further consideration in Tennessee is the "Rule of Sevens," which provides that children between the ages of 7 and 14 are rebuttably presumed to be incapable of negligence. *See* Bailey v. Williams, 346 S.W.2d 285, 288 (Tenn. App. 1961), *cert. denied* 3/10/61.

8. HONORABLE MENTION

(1) "Overly Polite" Motorist Causes Officer to Suspect Criminal Activity:

During a traffic stop for speeding in Ohio, the officer became suspicious when the motorist was "overly polite" and "breathing heavily." The officer called in a drug-sniffing dog, who found a bag of marijuana in the glove box. The motorist was arrested. The trial court granted the motorist's Motion to Suppress, and the Ohio Court of Appeals affirmed, finding that the officer lacked reasonable suspicion of criminal activity to warrant the canine sniff, and the prolonged detention to do so violated the motorist's Fourth Amendment rights. *See* State v. Fontaine, 2013 WL 6221373 (Ohio App. 8th Dist. 2013).

(2) Juror Sends Facebook Message to Witness During Trial:

During a first-degree murder trial in Davidson County, a juror sent a facebook message to one of the State's expert witnesses (the doctor who had performed the autopsy) after she completed her testimony. In the message, the juror stated, "I thought you did a great job today on the witness stand…I was in the jury…not sure if you recognized me or not!! You really explained things so great!!" The witness notified the trial judge, who in turn notified the attorneys. The jury returned a guilty verdict. Immediately after the jury was excused, but before they left the courthouse, the defense attorney asked the judge to inquire with the juror regarding the communications. The trial judge denied that request, and sentenced the defendant to life in prison. The trial court subsequently denied the defendant's Motion for New Trial. The Tennessee Supreme Court vacated and remanded for an evidentiary hearing "to ascertain the nature and extent of the improper communications" between the juror and the witness. *See* State v. Smith, 418 S.W.3d 38 (Tenn. 2013).

(3) Dead Man Walking, Part II:

An Ohio man's Petition seeking to set aside a 1994 Order declaring him to be legally dead has been denied. The petitioner, Donald Miller, appeared before Probate Judge Allan Davis, who ruled that under Ohio law, legal declarations of death may not be overturned after three years; the petitioner's ex-wife had objected to the petition, because she would have been required to repay Social Security benefits that she collected due to the petitioner's "death." The petitioner owed the ex-wife about $26,000 in overdue child support when he disappeared in 1986. "I don't know where that leaves you, but you're still deceased as far as the law is concerned," the Judge told the petitioner. (Source: *Man unable to get his death ruling overturned*, UPI.com, October 9, 2013).